87-175

No.

In The

# Supreme Court of the United States

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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RAYMOND P. TANGO, JR.,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err in denying petitioner's claim that the suppression, through false testimony, of exculpatory evidence by the State denied petitioner his right to due process and a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution? *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

2. Did the courts below err in denying petitioner's claim that the prosecution knowingly withheld material exculpatory evidence, thus denying petitioner's right to due process and a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution? *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

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No.

In The

# Supreme Court of the United States

October Term, 1987

RAYMOND P. TANGO, JR.

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Raymond P. Tango, Jr. petitions for a writ of certiorari to review the judgment of conviction of petitioner which was affirmed by the Superior Court, Appellate Division of the State of New Jersey and which the Supreme Court of the State of New Jersey declined to review.

## OPINIONS BELOW

The opinion in the Appellate Division of the Superior Court of New Jersey is printed *infra* in Appendix A at 1a-7a. The order of the Supreme Court of New Jersey denying the petition for certification is printed *infra* at Appendix B at 8a-9a. The judgment of conviction filed April 16, 1987 is printed *infra* in Appendix C at 10a-12a.

## STATEMENT OF JURISDICTION

The decision of the Supreme Court of New Jersey was filed on May 29, 1987. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner alleges a violation of his right under Amendment XIV of the United States Constitution, which reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Petitioner was convicted of murder, contrary to N.J.S.A. 2C:11-3, printed in Appendix D at 13a-20a, and possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a), printed in Appendix E at 21a.

## STATEMENT OF THE CASE

### A. Procedural History

Defendants, Raymond P. Tango, Jr., Louis Pasquarosa and Charles Stango, Jr., were charged with murder and possession of a firearm with the purpose to use it unlawfully against another. Co-defendants, Raymond P. Tango, Jr., and Louis Pasquarosa were jointly tried and convicted on July 14, 1981. Defendant Stango failed to appear at this trial.

During the pendency of petitioner's direct appeal, co-defendant Stango was found and tried before the Honorable Virginia Long, J.S.C., who presided over a 19-day trial from September 20, 1982 to October 28, 1982. During the Stango trial, testimony was elicited concerning fingerprints on the murder weapon and the murder vehicle, which was directly contradictory to the testimony that had been given at the trial of petitioner and Pasquarosa. That testimony was to form the basis for the motion for a new trial. An appeal from the denial of that motion presents the issues presently before this Court.

Petitioner's direct appeal resulted in the Appellate Division's affirming the trial court's judgment on February 2, 1983. The New Jersey Supreme Court denied petitioner's petition for certification and appeal in this matter on May 17, 1983. A petition for a writ of certiorari was denied by the United States Supreme Court on October 3, 1983.

On February 15, 1985, petitioner Tango filed a motion for a new trial in the Superior Court, Law Division, Union County. A hearing was conducted on May 20, 1985 and May 21, 1985 before the Honorable A. Donald McKenzie, J.S.C. Judge McKenzie filed an order denying petitioner's motion for a new trial on July 25, 1985.

An appeal from Judge McKenzie's denial of the motion for a new trial was filed on August 9, 1985. Appeal was also filed from a January 30, 1985 denial of motion for reconsideration of sentence. On September 9, 1985, the Superior Court, Appellate Division, consolidated petitioner's appeal from the denial of the motion for a new trial with the appeal from the denial of reconsideration of sentence. On December 23, 1986, in a *per curiam* decision, the Appellate Division held that because the false testimony was not material to the conviction, the prosecutor's failure to disclose the correct information did not violate *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Appellate Division affirmed the decision of the trial judge in regard to the motion for a new trial (App. A at 3a-6a).

A notice of petition for certification was filed on February 17, 1987 to the Supreme Court of New Jersey. That petition was denied by order entered May 29, 1987 (App. B at 8a-9a).

**B. Factual Background**

On the evening of October 16, 1980, William Earl Mann was shot several times in the back seat of a 1971 Chevrolet in the parking lot of the Sheraton Inn Hotel in Elizabeth, New Jersey.

At the trial of Raymond Tango and Louis Pasquarosa, held from June 16, 1981 through July 13, 1981, the prosecution introduced the testimony of a number of witnesses who heard the sound of gunfire and saw a car speeding away in the parking lot of the Sheraton.

The police testified that they found Mann, mortally wounded, and Louis Pasquarosa, who had been shot in the arm. Before he lost consciousness and died, Mann allegedly told Detective Robert Brojanowski that he had been shot by three men. Physical evidence indicated that Mann had been shot while in the back

seat of a 1971 Chevrolet. Blood stains on Pasquarosa's jacket were consistent with Mann's blood type. There was testimony that a .38 caliber Smith and Wesson revolver with five empty cartridges was found by police on the roof of a nearby building along with a hat and a pair of gloves. A 13 year old girl who lived on the block remembered that one evening in October, a man in his forties with mixed grey hair and a limp had thrown a cloth-wrapped object onto the roof. A younger, taller man accompanied him, but the girl did not make an identification of either man and neither man was represented to be Raymond Tango.

There was no physical evidence, such as blood, hair or saliva, linking Raymond Tango to the vehicle. There was no evidence linking Tango, Stango or Pasquarosa to the gun.

The evidence linking Raymond Tango to William Earl Mann was mainly circumstantial. His company car had been parked at the Sheraton that evening and he had been seen in the lounge in the Inn sometime between 3:00 and 5:00 that afternoon. It was established that in the past, Tango had business and/or social dealings with Mann and that at various times he had telephoned Mann.

The only "direct" evidence presented against Tango was given by Mann's mistress, Theresa Ireland, who had identified Raymond Tango, but not positively, as an occupant of the vehicle she saw Mann enter, after being questioned at length by Detective Brojanowski shortly after the killing. Ms. Ireland's testimony, descriptions and identifications varied and shifted from day to day during trial and her credibility on numerous physical details was called severely into question. Despite the fact that petitioner had a full beard on the date of this offense, Theresa Ireland could not even recall if he had a beard.

Detective Robert Brojanowski, who procured the identification from Theresa Ireland, was the partner of Detective Guslavage, who had been recently involved in a serious physical altercation with Raymond Tango. Defense counsel unsuccessfully sought to cross-examine him on this matter at the trial.

In essence, it was the State's case that Mann was lured by Pasquarosa into the automobile. The State contended that Charles Stango was the driver and Raymond Tango occupied the seat next to him. Pasquarosa, according to the State's case, was wounded in the cross-fire from the two guns that were used in the vehicle. The State's case, in short, was that William Mann was murdered in a 1971 Chevrolet by Charles Stango, Raymond Tango and Louis Pasquarosa, and that no other person was involved in the murder. The State's case was flatly inconsistent with the existence of another perpetrator.

During the trial, Detective Carmen Coppola, who directed the "processing" of the 1971 Chevrolet, testified unqualifiedly that the automobile had been dusted for fingerprints and that he "did not find any prints." This testimony caused both the prosecutor and the defense attorney to advance explanations for the lack of fingerprints on the automobile during summation. These competing theories were completely inaccurate in light of the fact that the car *did* bear the prints of an individual who, to this day, remains unknown.

One of the most critical pieces of evidence at trial was provided by Detective Brojanowski, who had directed the investigation and had procured the identification by Theresa Ireland. Under cross-examination by defense counsel, Brojanowski said that there were not enough identifying marks to show anyone's fingerprints on any of the evidence in the case, including the murder weapon. This testimony was never corrected by the prosecutor although the prosecutor knew it to be false.

Approximately one year later, at the trial of Charles Stango, Jr., a different prosecutor interrupted the trial proceedings for a sidebar discussion where he informed the court of the crucial discovery of an "awfully important" piece of evidence. The prosecutor said he had spoken with Detective Garry of the Elizabeth Police Department because he intended to offer Garry as a witness to testify that there were no latent prints lifted from any of the real evidence connected with the case. To his confessed astonishment, he was then informed by Detective Garry and Investigator Glenn Owens that the opposite was true. He was told that a clear palm print had been lifted from the murder weapon and fingerprints were found on the murder vehicle. He learned that a report existed which was not provided in discovery. Comparisons had been made *before Tango's trial* of these prints which showed conclusively that the fingerprints on the weapon were not those of the victim or of any of the three men indicted in the murder.

At the motion for a new trial, it was revealed that on April 21, 1981, the prosecutor at the Tango trial had sent a letter to Tango's defense attorney which revealed that identifiable fingerprints were not found on the weapon or vehicle. Two days later a second and thoroughly ambiguous letter was sent by the prosecutor to Tango's defense attorney which indicated that a "partial print" was recovered from the weapon which was "not identified" as Raymond Tango's. During the hearing in the motion for a new trial, the prosecutor testified that *he* did not realize that his own office's tests showed *conclusively* that the prints were those of someone other than the accused. The defense attorney testified that he did not recall ever seeing the second letter before the Tango trial. He stated that had he been aware of the fingerprints on the vehicle and on the murder weapon, he would have incorporated that information as a very significant part of his defense.

At the hearing on the motion for a new trial, the court determined that both the Elizabeth Police Department, through its Detective Garry, and the Union County Prosecutor's Office, through its investigator Glenn Owens, were aware that clear identifiable prints had been lifted from both the murder weapon and the murder vehicle, and that the prints were shown positively to have belonged to an unknown individual who was not Mann, Tango or Pasquarosa. Investigator Owens described what he found as "fully consistent with a recent print," and concluded that it was "very possible that the prints left on the Smith and Wesson were in fact made by the last user." Even though both men informed their superiors of their findings, the evidence was not provided in the lengthy investigation reports of Officer Brojanowski, who headed the Elizabeth Police Department investigation, and William Eichhorn, who headed the Union County investigation. The reports in question were in all other respects extremely detailed, reciting the results of hair follicle and saliva analyses, but omitting the print evidence.

On June 26, 1985, the trial court rendered its opinion denying the motion for a new trial. The court found that *false testimony, uncorrected at trial, was offered by prosecution witnesses and the prosecutor himself had knowledge that these witnesses falsely testified* to the absence of prints. The court, however, declined to grant Raymond Tango a new trial because it found that his trial counsel elected not to pursue the matter of the false testimony by the prosecution witnesses and thus waived his right to relief on this ground.

In the *per curiam* opinion affirming the trial court's conclusions regarding the motion for a new trial, the Appellate Division determined that the false testimony, placed in the context of the entire proofs produced at trial, was of minimal significance. The Appellate Division determined that the prints found on the vehicle and the murder weapon could have been placed by any passerby and therefore were neutral rather than exculpatory facts.

The Appellate Division declined to grant a new trial on the grounds that the false testimony was not material to the conviction.

**C. Issues Raised**

The false testimony of State witnesses knowingly elicited by the prosecutor constituted evidence that went to the very heart of the defense. The existence of the prints of an unknown party on the murder weapon and murder vehicle contradicted the State's theory of the case and would have raised a reasonable doubt with respect to the already tenuous evidence against the petitioner. By permitting this false, material testimony to go uncorrected, the court denied the petitioner a fair trial and the due process rights conferred by the Fourteenth Amendment.

The defense was denied access to exculpatory evidence which would have affected the outcome of the trial. Had the defense attorney been given access to the positive identifiable print evidence implicating an unknown perpetrator, the evidence would have been presented and would have affected the judgment of the jury. The suppression of this evidence denied petitioner a fair trial and his right to due process under the Fourteenth Amendment.

Both of these federal constitutional issues were raised at the trial court level and were denied below. These federal constitutional issues were again raised in the Superior Court, Appellate Division and in the New Jersey Supreme Court, and no relief was granted.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURTS BELOW ERRED IN DENYING PETITIONER'S CLAIM THAT THE SUPPRESSION OF CRITICAL PHYSICAL EVIDENCE THROUGH FALSE TESTIMONY DENIED PETITIONER A FAIR TRIAL AND VIOLATED HIS DUE PROCESS RIGHTS.

The state appellate courts determined that evidence of identifiable fingerprints of an unknown person found on the murder weapon and murder vehicle was a "neutral," not an "exculpatory" fact, and therefore did not weigh it in light of what it conceded was knowingly false presentation of contrary facts by the prosecution.

There can be no question but that the testimony presented to the jury on at least two occasions concerning fingerprint evidence was at direct variance from the truth, as it is known now and as it was understood then by the prosecutor or members of his team. This was found by Judge McKenzie in his decision on the motion for a new trial. On June 23, 1981, at the trial of Raymond Tango, Detective Carmen Coppola, who directed the search of the murder vehicle, testified in response to the direct examination of Assistant Prosecutor John DeMassi, that the 1971 Chevrolet had been dusted for fingerprints in his presence and at his direction and that no fingerprints were found.

Two weeks later, on July 7, 1981, Detective Robert Brojanowski was asked on cross-examination by Raymond Tango's attorney, Dennis McAlevy, Esq., whether Mr. Tango's fingerprints had been found on any of the evidence that had been adduced at trial, including the murder vehicle and the murder weapon. Detective Brojanowski responded that there "were not

enough identifying marks to show anyone's fingerprints."

Thus, the testimony that was permitted to go to the jury during Raymond Tango's trial was diametrically opposed to the truth. Detective Copolla's testimony precipitated speculation on summation from both prosecutor and defense attorney as to *why* there were no prints on the car; the common premise of both men was false. Detective Brojanowski testified that there were no decipherable prints found; the truth was that recent, decipherable prints had been found, that comparisons had been made of those prints and that it had been established conclusively that the prints were those of an individual *other than the petitioner or the victim.*

Raymond Tango was convicted of murder on the basis of indirect and questionable evidence — his past association with the victim, the presence of his company car at the Sheraton Inn on the night in question, his association with the other defendants and, finally, the troubled visual identifications by the victim's mistress, Theresa Ireland. There was no other testimony linking Raymond Tango to the murder. More importantly, there was no testimony linking anyone *other than the defendants* to the murder.

Within this factual vacuum was one piece of hard, irrefutable evidence. Recent, clear, identifiable fingerprints were found (1) on the gun that both prosecution and defense conceded to be the murder weapon, and (2) on the vehicle in which the victim was shot to death. Those prints had been compared, days after the killing, to prints on file of Raymond Tango, Louis Pasquarosa, and William Mann and, after the trial, to the prints of Charles Stango. In each case, the comparison was negative. The obvious inference from this evidence is that the last person to hold the weapon before it was found by the police was someone other than the defendants or the victim. A natural and probable conclusion from that inference is that the individual who shot William Mann

with that weapon was someone other than Raymond Tango, Charles Stango or Louis Pasquarosa.

The evidence suggesting that an unknown individual participated in the killing of William Mann would have vitiated the entire theory of the prosecution, which was that the three men indicted had orchestrated and executed the killing alone. In conjunction with the clear print found on the murder vehicle, the print of the unknown individual on the murder weapon constituted the most important fact in the case. The existence of these prints supported other evidence that an unknown person committed the murder.

Nor can it be said that the fingerprint found on the front window of the vehicle, even considered apart from the fingerprint evidence on the gun, would not have "affected the judgment of the jury." According to the State's theory, Raymond Tango was the individual sitting in the right front seat of the automobile at the time of the killing. Both the defense attorney and the prosecutor commented extensively to the jury on the significance of the lack of any fingerprint evidence on the murder vehicle. If the supposed *lack* of fingerprint evidence on the vehicle was of sufficient importance to both attorneys for them to stress it before the jury, surely the fact that a print *was in fact found* in Mr. Tango's supposed location, and that the print was from an individual other than any of the defendants, was of enough significance to have "affected the judgment of the jury."

There can be no question but that fingerprint evidence demonstrating the existence of an unknown party, other than the defendants, would be vital to the defense case. This is especially true when the case against petitioner was almost completely circumstantial and the credibility of the identification testimony by Ms. Ireland was subject to serious doubt.

This fingerprint evidence also raises serious questions as to the credibility of Detective Brojanowski and the State's entire case. Detective Brojanowski was the individual who directed the investigation, who obtained the identification from Ms. Ireland, and who lied on the stand about the prints. Detective Brojanowski also held a personal bias against Raymond Tango as a result of a prior physical altercation between Tango and Detective Brojanowski's partner, Detective Guslavage. The credibility of Brojanowski, the identification by Ms. Ireland and the State's entire case takes on a new dimension in light of the knowing presentation of false testimony by Brojanowski and other state witnesses concerning independent evidence which would plainly serve to exculpate petitioner. That new dimension is the realm of reasonable doubt.

Indeed, there can be no doubt that this would have been the centerpiece of the defense. The fingerprint evidence in this case was hard, independent evidence. This print evidence was not cumulative or collateral, and it exculpated the petitioner by showing that someone other than the petitioner had possession of the murder weapon and the murder vehicle.

Under the United States Constitution, where a prosecutor allows false testimony to go uncorrected when it appears at trial and the false testimony is material to the conviction, the defendant has been deprived of a fair trial, and thus, of due process of law. *Napue v. Illinois,* 360 U.S. 264, 269, 79 S. Ct. 1173, 1175, 3 L. Ed. 2d 1217, 1221 (1959).

The United States Supreme Court is not bound by the factual finding of the New Jersey Superior Court, Appellate Division in its conclusion that the fingerprints were not material to the conviction of the petitioner. The federal constitutional deprivation in this case mandates that this Court make its own "independent examination" of the record. *Napue v. Illinois, supra* at 360 U.S.

at 271-272, 79 S. Ct. at 1176, 3 L. Ed. 2d at 1223.

In the instant case, it is plain that the prosecutor had knowledge of the falsity of the testimony concerning the fingerprint evidence. The trial court acknowledged in its opinion that, with respect to the prints recovered from the weapon, the prosecutor "had knowledge that the detectives falsely testified to the absence of prints." With respect to the print found on the murder vehicle, the court found that the knowledge of Detective Garry and Captain Kelly could not be imputed to the prosecutor.

Case law is clear, however, that it is not necessary to show that the prosecutor himself played a knowing part in the procurement of false testimony in order to satisfy the criterion of prosecutorial participation. Prosecutorial failure is not neutralized because the information tending to exculpate the petitioner was in the hands of the police rather than the prosecutor himself. It has been held that "the duty of disclosure affects not only the prosecutor but the Government as a whole, including its investigative agencies." *United States v. Caldwell,* 543 F.2d 1333, 1352 (D.C. Cir. 1976), *cert. denied,* 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976); *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971), *on remand,* 331 F. Supp. 927 (D.C. Dist. Ct. 1971), *aff'd,* 448 F.2d 1182 (D.C. Cir. 1971). Officers Coppola and Brojanowski were also plainly part of the prosecution team prepared and called by the trial prosecutor. They lied under oath about the fingerprint evidence. Under any concept of fundamental fairness, the prosecution must be held accountable. *United States v. Diecidue,* 448 F. Supp. 1011 (M.D. Fla. 1978), *aff'd in part, rev. in part,* 603 F.2d 535 (5 Cir. 1979). Indeed, to hold otherwise would be to encourage investigators to conceal "unfavorable" evidence from the attorney prosecuting the case.

If the fingerprint evidence had been exposed, the weight given to the testimony of Brojanowski, the identification by Ms. Ireland

and the investigation itself would have been subject to serious doubt. More important, the defense's choices and strategies would have been utterly different.

This is not cumulative evidence, but independent, hard physical evidence with the power to persuade and to alter perceptions and conceptions. It is impossible to know how the jury would have "called it" because it is impossible to know what would have been before the jury to call. Justice is not an exercise in speculation or a parlor game for scholars. "What if the South had won the war" is an interesting experiment in history and no one gets hurt. But "what if Raymond Tango had received a fair trial" should not be played out in the luxury of a quiet room. Raymond Tango is in prison for life. He should receive his fair trial now.

## II.

## THE COURTS BELOW ERRED IN HOLDING THAT THE FINGERPRINTS ON THE MURDER WEAPON AND MURDER VEHICLE WERE NOT MATERIAL.

The New Jersey Appellate Division concluded that evidence of a fresh, identifiable palm print of an unknown person on the murder weapon and the murder vehicle was not an exculpatory, but a neutral fact. The Appellate Division held that because it was possible that these objects could have been handled by non-assailants prior to the time of discovery, they were not material. The record does not support this assumption. In fact, the testimony of Detective Owens at the motion for a new trial supports the position that the prints found on the murder weapon were of recent origin and were likely those of the last person to use the gun.

The existence of fingerprints of a definite, unknown person, neither the victim nor the accused, on the murder weapon and

on the murder vehicle is clearly evidence which is favorable to the petitioner. These fingerprints support petitioner's contention that there was a misidentification by Ms. Ireland. The identification of petitioner was questionable, and the jury could easily conclude that it was the party that left the fingerprints, not Tango, who was involved in the killing of Mann. Petitioner is entitled to a new trial because the prosecution withheld material evidence favorable to him, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

The materiality necessary to establish a *Brady* error varies along a sliding scale of prosecutorial violations involving those situations where the defense was deprived of discovery while the prosecution had knowledge of the information. *United States v. Agurs, supra,* 427 U.S. at 103-104, 96 S. Ct. at 2397, 49 L. Ed. 2d at 349-350.

The first situation is where the prosecution knowingly proffers perjured testimony. The Court has "applied a strict standard of materiality" because the very foundation of the truth-seeking process has been corrupted. If the knowing use of perjured testimony could have "affected the judgment of the jury," then the conviction must be set aside. *United States v. Agurs, supra,* 427 U.S. at 103-104, 96 S. Ct. at 2397, 49 L. Ed. 2d at 349-350. The second situation is where the defense has made a request for specific evidence. In determining materiality, the determination is whether the "suppressed evidence may have affected the outcome." *Id.,* 427 U.S. at 104, 96 S. Ct. at 2398, 49 L. Ed. 2d at 350. The third situation is where the defendant has made a general request for "*Brady* material." Under these circumstances, materiality is measured by whether the "omission is of sufficient significance to result in the denial of defendant's right to a fair trial." *Id.,* 427 U.S. at 108, 96 S. Ct. at 2400, 49 L. Ed. 2d at 352.

In the instant case, there can be no question but that there was information revealed after the trial of Raymond Tango which had been known to the Prosecutor's Office but unknown to the defense. It is equally clear that the question of fingerprints had been a specific focus of discovery. It was concluded by Judge McKenzie and the Appellate Division that false testimony concerning that evidence was knowingly presented by the prosecution. Under the sliding scale set forth in *United States v. Agurs, supra,* the judgment of conviction must be vacated if the undisclosed evidence "might have affected the judgment of the jury."

The evidence in question here was not "character" evidence, "impeachment" evidence or "cumulative" evidence. It was substantive evidence of the most elemental kind. It was strongly probative of the fact that an unknown person shot the decedent. Even if one makes the assumption that, weighed against the testimony of Theresa Ireland, the evidence might not have "changed the outcome" of the trial, it is unthinkable that the evidence would not have "affected the judgment" of the jury, and the likelihood that the evidence would have affected the jury's judgment, *i.e.*, that they would have weighed it seriously, is the applicable test in the case of active prosecutorial misrepresentation.

## CONCLUSION

For all the reasons set forth, the petition for a writ of certiorari should be granted so this Court may review this matter and the petitioner's conviction may be reversed.

Respectfully submitted,

BARRY T. ALBIN
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Dated: July 23, 1987

## APPENDIX A—OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED DECEMBER 23, 1986

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-5524-84T4
A-5785-84T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAYMOND P. TANGO, JR.,

Defendant-Appellant.

Argued December 9, 1986 - Decided December 23, 1986

Before Judges Pressler, Baime and Ashbey.

On appeal from the Superior Court, Law Division, Union County.

Frederick J. Dennehy argued the cause for appellant (Wilentz, Goldman & Spitzer, attorneys; Warren W. Wilentz and Mr. Dennehy, of counsel; Mr. Dennehy and James E. Trabilsy, on the brief).

Arthur S. Safir, Deputy Attorney General, argued the cause for respondent (W. Cary Edwards,

*Appendix A*

Attorney General of New Jersey, attorney; Mr. Safir, of counsel and on the brief).

PER CURIAM

By these consolidated appeals, defendant Raymond P. Tango, Jr., appeals from an order denying his motion for a new trial and from an order denying his motion for reconsideration of sentence. We affirm the first and reverse the second.

Tango was indicted in October 1980, together with Louis Pasquarosa and Charles Stango, Jr., all of whom were charged with the purposeful murder of William Mann and the possession of a firearm for the purpose of using it unlawfully. Stango failed to appear at the scheduled joint trial, which proceeded against the other two, both of whom were found guilty by jury verdict returned in July 1981. Both were sentenced to life imprisonment for the murder and to a concurrent seven-year term for the weapon offense. Pasquarosa's sentence was subject to a ten-year parole disqualifier but Tango's to a twenty-year parole disqualifier. Tango's direct appeal from his conviction terminated in October 1983 when the United States Supreme Court denied his petition for *certiorari* to review the New Jersey Supreme Court's denial of his petition for certification to review our affirmance of the conviction.

During the pendency of the direct appeal process, Stango was located, tried, convicted, and sentenced to the same sentence imposed on Pasquarosa. Tango's present motion for a new trial

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* [It should be noted that the Appellate Division incorrectly states that Pasquarosa and defendant received life sentences. Defendant received a life sentence with a 20 year period of parole disqualification and Pasquarosa received a 20 year sentence and a 10 year period of parole disqualification.]

is based on fingerprint evidence introduced during Stango's trial which Tango claims to have been improperly withheld from him by the State prior to his trial, to have been the subject of false testimony given by State's witnesses during his trial, and to have been material to the question of guilt. The separate motion for reconsideration of sentence is based on the assertion that the sentencing judge based his parole ineligibility period, twice that imposed on both Stango and Pasquarosa, on improper criteria.

We address first the denial of the new trial motion, whose consideration requires some reference to the underlying facts. The State's proofs convincingly established that on the day of his murder, the victim Mann, in response to a telephone call from Pasquarosa, was driven by his girlfriend, Theresa Ireland, to the Sheraton Inn Hotel in Elizabeth where they rendezvoused with another car which had three occupants. The three were identified by Ireland, who had had previous contact with them all, as Pasquarosa, Tango and Stango. Stango was driving, Tango was seated in the front passenger seat, and Pasquarosa was seated in the rear. Mann left his car and entered the rear of Stango's car. Ireland saw Tango turn around and gesture angrily in Mann's direction. A few minutes later, Stango's car was driven to the other side of the hotel out of Ireland's line of vision. As it pulled away, however, she saw Mann in the back seat sitting motionless like a "statue." Within moments thereafter two hotel employees, together with three hotel security guards, heard shots and ran into the parking lot. They saw a vehicle speeding away and Mann, who had been shot, lying on the ground asking for help and repeatedly referring to three men. Pasquarosa was also in the parking lot, having been shot as well. Mann was taken to the hospital where he again referred to three assailants who were known to him but lost consciousness before he was able to identify them. He died the same night.

*Appendix A*

Ireland was questioned at police headquarters shortly after the shooting, where she described the events as well as the three men and identified Tango and Stango from two sets of photographs she was then shown. The vehicle in which Mann had been shot, a 1971 Chevrolet, was discovered by a passerby the next day parked on a public street about a half mile from the hotel. On a rooftop in the immediate vicinity of the place where the car was found, the police discovered a .38 caliber gun and a pair of gloves. It was ascertained that that weapon had fired some but not all of the bullets with which Mann had been struck. It was also determined that Tango's car, belonging to his employer but his exclusively to use, was in the hotel parking lot on the evening of the murder.

The fingerprint evidence forming the basis of the new trial motion consisted of a fingerprint found on the outside of a passenger window of the 1971 Chevrolet, which had otherwise been completely wiped free of prints, and two partial palm prints found on the strap of the handle of the .38 revolver, which was also otherwise free of prints. The police testimony at Stango's trial was that neither print was that of either Stango, Tango, or Pasquarosa. The gravamen of this motion is that (1) prior to Tango's trial, his attorney was falsely told that the prints were unidentifiable, not that they had been identified as belonging to none of the defendants, and (2) the State's witnesses falsely so testified without intervention by the prosecutor, who knew the testimony to be false. Tango also takes the position that if any of the prosecutor's pretrial disclosures were construable as having advised his trial counsel that either print was ascertained not to have been his, then counsel performed ineffectively by failing properly to use that information at trial.

These issues were explored by way of an evidential hearing

on the new trial motion, following which the trial judge, in a written opinion, made findings of fact and conclusions of law on which he based his denial of the motion. Essentially, he concluded that even though the State's testimony at Tango's trial respecting the fingerprints was false and even though the prosecutor knew that the testimony was false, at least in respect of the palm print on the weapon, nevertheless, considering the totality of the evidence which convincingly demonstrated Tango's guilt, the true fact, namely, that none of the three defendants had left such prints as were found, was not material in any relevant sense.

We agree that in the context of the proofs at trial that fact was of minimal significance. That is patently so in respect of the fingerprint on the murder vehicle. The interior of the car had been wiped clean of prints and the car itself had been found sometime after the murder parked on a public street. Any passerby, including the passerby who telephoned the police to report its discovery, could have left the print. Nor was the palm print on the .38 revolver a fact of any substantially greater import. Most significantly, that weapon, which was not the only murder weapon, could easily have been handled, before its discovery, by a non-assailant or, indeed, could have been disposed of by a non-assailant. There was, further, no reason to assume that the prints on the car and the gun had been made by the same person. We are therefore satisfied that, in these circumstances, the discovery of prints belonging to a person or persons other than the three defendants and the victim was a neutral rather than an exculpatory fact.

Based on the foregoing, we agree with the trial judge that the false testimony, in terms of its materiality, failed to meet the remedial standard of *Napue v. Illinois,* 360 *U.S.* 264 (1959), and

*State v. Cahill,* 125 *N.J. Super.* 492 (Law Div. 1973), and that the prosecutor's failure to have disclosed the correct information to defendant, even if it were concluded that he in fact did fail to do so, did not meet the remedial standard of *Brady v. Maryland,* 373 *U.S.* 83 (1963), and *United States v. Agurs,* 427 *U.S.* 97 (1976). Nor do we perceive any dereliction of counsel in respect of the fingerprint evidence which would rise to the remedial standard of *Strickland v. Washington,* 466 *U.S.* 668 (1984). In short, we are satisfied that the jury's understanding that the prints were unidentifiable rather than that they were identified as belonging to other persons did not have a capacity, considering the proofs as a whole, to have affected its essential judgment, to have raised a reasonable doubt where none had existed, or to have influenced the ultimate outcome. *See also State v. Carter,* 91 *N.J.* 86 (1982).

Although we are satisfied that the jury's verdict of guilt must be sustained, we are troubled by the parole ineligibility term of the sentence which was challenged by the motion for sentence reconsideration,[1] particularly in view of the substantially more lenient mandatory terms imposed on Pasquasora by the same judge and on Stango by another judge. We are persuaded that the explanation for the disparity was Tango's refusal to cooperate with the probation department in its preparation of its presentence investigation. Consequently, the report lacked much of the information which is ordinarily considered by the sentencing judge in identifying and weighing aggravating and mitigating factors.

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1. The motion for reconsideration was made pursuant to *R.* 3:21-10(a). The State argues that it is time-barred by reason of the absolute 60-day time period to which the rule was subject by amendment effective September 1982. We conclude, however, that the pre-amended version of the rule, which preserved the right to make a reconsideration motion until after the conclusion of the direct appeal process, applies here since this judgment of conviction was entered prior to the date of the rule amendment.

*Appendix A*

We need not here determine whether the parole ineligibility term reflected an aspect of punishment of Tango for his noncooperation or was based simply on a report so incomplete as to preclude a proper weighing of sentence factors. In any event, we are satisfied, as is now urged, that Tango's silence and refusal to cooperate was based on advice of trial counsel given for reasons which had at least *prima facie* merit and that he was too severely penalized for his silence. There is, of course, no question as to the critical significance of the presentence report in the sentencing process or of the consequent obligation of the probation department, largely unperformed here, to resort to alternative sources of information. *See State v. Richardson,* 117 *N.J. Super.* 502 (App. Div. 1971). *And see generally, State v. Kunz,* 55 *N.J.* 128 (1969); R. 3:21-2. Considering all of these factors, we are satisfied that defendant's sentence was not based on an adequate evaluation of all relevant factors. *See State v. Martelli,* 201 *N.J. Super.* 378 (App. Div. 1985). We therefore conclude that the interests of substantial justice require a new sentencing proceeding based on a full and updated presentence report. The imposition of a parole ineligibility period will then be a matter within the sound discretion of the court.

We remand to the trial court for reconsideration of the parole ineligibility term of the sentence. In all other respects, the judgment of conviction is affirmed.

(Stamped)

I hereby certify that the foregoing is a true copy
of the original on file in my office.

Elizabeth McLaughlin
Clerk

**APPENDIX B—ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED MAY 29, 1987**

SUPREME COURT OF NEW JERSEY

C-1015 September Term 1986

26,781

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RAYMOND P. TANGO, JR.,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5524/5785-84T4 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 28th day of May, 1987.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

*Appendix B*

(Stamped)

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

**APPENDIX C—JUDGMENT OF CONVICTION OF THE NEW JERSEY SUPERIOR COURT FILED APRIL 16, 1987**

NEW JERSEY SUPERIOR COURT
UNION COUNTY

LAW DIVISION — CRIMINAL

S.B.I. NO. 37009A

DATE OF ARREST 10/18/80

JUDGMENT OF CONVICTION
and
ORDER OF COMMITMENT

THE STATE OF NEW JERSEY

vs.

RAYMOND P. TANGO, JR.

RESENTENCING

#427-1980 Term

Murder N.J.S.2C:11-3

Possession of a Weapon for Unlawful Purpose (2nd. Degree) N.J.S.2C:39-4(a)

Pursuant to Appellate Division Decision rendered on 12/24/86

IT IS, THEREFORE, on 4/16/87 ORDERED AND ADJUDGED that the

*Appendix C*

Previous sentence stands.

Count #1—Custody of the Commissioner of the Department of Corrections for life imprisonment, to be eligible for parole after serving twenty (20) years.

Count #2—Custody of the Commissioner of the Department of Corrections for seven (7) years, to be served concurrently with sentence imposed on Count #1.

If the offense occurred prior to January 9, 1986, a penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1.

If the offense occurred on or after January 9, 1986, a penalty of $30 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1

/____/penalty imposed on count(s) ____ is $_____, respectively.

Total Fine__, Total Restitution__, Total VCCB Penalty $10,000.00

Installment payments, if applicable, are due at the rate of $____ per ____.

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e) APPEARS ON THE REVERSE SIDE.

*Appendix C*

ATTORNEY FOR DEFENDANT

Upon entry of Guilty Plea of conviction
W. Wilentz & F. Dennehy

W. Wilentz & F. Dennehy
At time of sentencing

Defendant to receive R.3:21-8 credit for time spent in custody

From _____ to _____
Days Credit _____

s/ Walter G. Halpin
COUNTY CLERK/
DEPUTY CLERK SUPERIOR COURT

Date: April 16, 1987

STATEMENT OF REASONS, R.3:21-4(e)

See attached transcript

s/ A. Donald McKenzie
JUDGE
HON. A. DONALD MCKENZIE
J.S.C.

## APPENDIX D—N.J.S.A. 2C:11-3

2C:11-3. Murder

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or fight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or

substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder may be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment, of anything of pecuniary value shall be sentenced as provided hereafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether

the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section. Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury.

(2) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection. The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence

to establish the existence of any aggravating or mitigating factor. Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceedings.

(3) The jury, or if there is no jury, the court shall return a special verdict setting forth in writing the existence or non-existence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it is or is not outweighed by any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that any aggravating factors which exist are outweighed by one or more mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a

unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

The aggravating factors which may be found by the jury or the court are:

(a) The defendant has previously been convicted of murder;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of any thing of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for

the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

*Appendix D*

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

(e) Every judgment of conviction which results in a sentence of death under this section may be

appealed, pursuant to the rules of court, to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

L.1978, c. 95, § 2C:11-3, eff. Sept. 1, 1979. Amended by L.1979, c. 178, § 21, eff. Sept. 1, 1979; L.1981, c. 290, § 12, eff. Sept. 24, 1981; L.1982, c. 111, § 1, eff. Aug. 6, 1982.

## APPENDIX E—N.J.S.A. 2C:39-4

2C:39-4. Possession of weapons for unlawful purposes

a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

b. Explosives. Any person who has in his possession or carries any explosive substance with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

c. Destructive devices. Any person who has in his possession any destructive device with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

d. Other weapons. Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree.

L.1978, c. 95, § 2C:39-4, eff. Sept. 7, 1979. Amended by L.1979, § 179, § 3, eff. Sept. 1, 1979.